CHO CHIN HUAT v. LEE BOO HOCK

[F.C. (Azmi L.P., Suffian & Gill F.JJ.) September 13, 1969]

[Kuala Lumpur — Federal Court Civil Appeal No. X. 66 of 1968]

Practice and Procedure — Leave to sign judgment — R.S.C. 1957, O. 14 — Leave to defend unadmitted part of claim on deposit of amount in dispute in court — Principles applicable.

In this case the appellant (defendant in the court below) appealed against the judgment of the High Court which gave the plaintiff-respondent leave to sign final judgment against the defendant in the sum of $5,000 and granting the defendant leave to defend the action as to the residue of the plaintiff's claim amounting to the sum of $5,200 conditional upon his depositing in court the said sum of $5,200 within one week of the date of the order.

Held, dismissing the appeal: a defendant should be given unconditional leave to defend unless it is clear that there is no real substantial question to be tried or that there is no dispute as to the facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment but where there is something suspicious in the defendant's mode of presenting his case or where the court is left with a real doubt about the defendant's good faith, even though it cannot be said for certain that there is not a triable issue, it is entitled to make an order that the defendant do pay the amount claimed or any lesser sum into court or furnish security for that amount as a condition for leave to defend.

Cases referred to:—

(1) *Jacobs* v. *Booth's Distillery Co.* (1901) 85 L.T. 262.

(2) *Fieldrank Ltd.* v. *Stein* [1961] 3 All E.R. 683.

FEDERAL COURT

Peter M. Williams for the appellant.

U. Masacarole for the respondent.

Cur. Adv. Vult.

Gill F.J.: This is an appeal against an order of the High Court at Johore Bahru made under Order 14 of the Rules of the Supreme Court, 1957 giving the plaintiff leave to sign judgment against the defendant in the sum of $5,000 and granting the defendant leave to defend the action as to the residue of the plaintiff's claim amounting to the sum of $5,200 conditional upon his depositing in court the said sum of $5,200 within one week from the date of the order.

The action was commenced on 20th May, 1968 by a writ which was specially indorsed with the plaintiff's claim for the sum of $10,200 being the balance due to him for work carried out for and materials supplied to the defendant at Majidee Camp, Johore Bahru in accordance with a works order dated 8th August, 1967 issued to the plaintiff by the defendant and relating to item 6 of general contract No. FED/J/114/67. The writ was served on the defendant on the same day as it was taken out. He entered appearance on 27th May, 1968 and filed his statement of defence on 4th June, 1968.

In paragraph 2 of his defence the defendant stated that by a works order dated 8th August, 1967 he requested the plaintiff to carry out certain works relating to item 6 of a contract No. FED/J/114/67 entered into between him and the Government of Malaysia upon the terms and conditions therein contained. Paragraph 3 of the defence stated that one of the terms and conditions of the said works order was that the plaintiff would do the said works to the specifications of the Government and that the defendant would pay to the plaintiff whatever sum of money was found to be due to him on receipt of a certificate that the said works had been done to the satisfaction of the Government. The statement of defence went on to say that, as up to the date of the filing of the defence no certificate had been received by the defendant from the Government, the plaintiff's action was premature,

On 17th July, 1968 the plaintiff took out a summons-in-chambers for an order that he be at liberty to sign final judgment against the defendant for a sum of $10,200 and $200 costs. In his affidavit in support of the application for final judgment, the plaintiff said with regard to paragraphs 1, 2 and 3 of the statement of defence that there was nothing in the works order dated 8th August, 1967 which stipulated that payment of the balance due to him would be made only after the issue of the certificate from the Government. He stated further that the provision in the works order was that the contract arising therefrom would be complete when the supervisor of the Military Authority was satisfied with the work carried out under the main contract, such supervisor being the State Engineer, Johore, and that the State Engineer had written to his solicitors on 30th June, 1968 advising them that the whole works under the main contract had been accepted as from the 28th day of February, 1968. He went on to say that the total amount due to him under the works order was $30,200 of which a sum of $20,000 had been paid by various amounts on the dates set out in the affidavit, leaving a balance of $10,200 still due and payable. He concluded his affidavit by stating that he verily believed that there was no defence to the action.

In his affidavit sworn to on 3rd August, 1968 and filed under Order 14 rule 3 for the purpose of showing cause against the plaintiff's application, the defendant admitted that the whole of the works under the main contract had been accepted by the Government but that as these works were subject to a variation order in relation to the omission of certain works, the actual work that was completed and handed over had not yet been finally computed in regard to its value. In this connection, the defendant exhibited to his affidavit a copy of

a letter dated 29th July, 1968 from the State Engineer to his solicitors to the effect that though the completion date was 28th February, 1968 the accounts were yet to be finalised.

In answer to the defendant's affidavit, an assistant solicitor in the employ of the plaintiff's solicitors filed an affidavit sworn to on 2nd September, 1968 to the effect that he had received a letter dated 26th August, 1968 from the State Engineer stating that the accounts in respect of general contract FED/J/114/67 had been finalised and agreed upon and that the variation order to omit with regard to item 6 amounted to a reduction of $5,786.80. A copy of the letter received from the engineer was exhibited to the affidavit.

The plaintiff's application first came up for hearing on 14th August, 1968 when by consent it was adjourned until 7th September, 1968 from which date it was further adjourned until the following morning for the defendant's solicitors to give the final figure. On 8th September, 1968 the defendant filed a further affidavit to say that on the site plan the area that was to be constructed with roads and hard standing amounted to 7,200 square yards which, worked out at $5 per square yard, amounted to $36,000 and that the plaintiff, having completed only 5,000 square yards, was entitled, at the rate of $5 per square yard, to a sum of $25,000, out of which he had already been paid the sum of $20,000, thus leaving a balance of $5,000 due and owing to him. On the application coming up for hearing again on the same day, the learned judge made the order which is the subject matter of this appeal.

The first ground of appeal that the plaintiff's application for summary judgment did not comply strictly with Order 14 of the Rules of the Supreme Court, 1957 in that the affidavit in support of the application did not verify the cause of action was not pursued because it is clear that the affidavit, which I have summarised above, did verify the cause of action.

The second ground of appeal is that, having regard to paragraphs 3, 4 and 5 of the defence and to the learned trial judge's findings, the learned trial judge erred the law in giving leave to the plaintiff to enter judgment against the defendant for the sum of $5,000. I can find no merit in this ground of appeal either. Obviously leave to sign judgment was made on an unequivocal admission by the defendant that he owed the plaintiff a sum of $5,000, and I can see nothing in the learned trial judge's grounds of judgment to suggest that he had made any findings which went to show that that amount was not owing. As stated by his Lordship in his grounds, there was no doubt in his mind as to the defendant's liability to pay the plaintiff. The only question, as he said, was with regard to the extent of the defendant's liability, and liability to the extent of $5,000 was admitted.

It was stated by the defendant in his statement of defence that as the State Engineer had not finalised his accounts the action was premature. I do not agree. The work had been completed before the action was filed and the only matter which had not been finalised was the amount due from the Government to the defendant for the work done under the main contract. There was nothing in the contract between the parties to this action to suggest that the defendant was not liable to pay the plaintiff until the issue of a certificate from the State Engineer as to the amount due on the main contract. The defendant knew the yardage of the road completed by the plaintiff and there was no dispute as regards the rate of payment per square yard. The contract was for a sum of $36,000, and allowing for the fact that the amount which, according to the State Engineer, had to be deducted from that amount in respect of the omissions under item 6 of the main contract was $5,786.80, work to the value of $30,200 as claimed by the plaintiff had in fact been done.

The third ground of appeal is that the learned trial judge erred in fact and in law in holding that the defence was only an attempt to delay payment. This ground of appeal is linked with the fifth ground of appeal that the learned trial judge misdirected himself in finding that the last affidavit of the defendant contained a new defence. As the defendant had at first taken the stand that the whole claim was premature and later admitted that the amount owing by him was $5,000 the learned trial judge was quite right in taking the view that the defence put up, although it raised a triable issue or issues, was not made in good faith. Both these grounds must therefore also fail.

The fourth ground of appeal is that, assuming that the terms of the general contract between the defendant and his principals were a legitimate defence to the action by the plaintiff, the learned trial judge erred in law in holding that the onus of showing that the plaintiff was not entitled to the amount claimed lay with the defendant. What the learned trial judge clearly meant was that if the defendant's case was that the amount due from him was not the amount claimed by the plaintiff but some lesser amount, then the onus of proving that was on him. As I have already stated, the defendant did admit owing $5,000. He was given leave to defend as regards the balance of the claim. Leave to defend was made conditional because the learned trial judge was satisfied that the defence put

up was not *bona fide*. In coming to that conclusion, he was largely influenced by the fact that the accounts had in fact been finalised.

The other two grounds of appeal are to the effect that there were important issues in dispute between the plaintiff and the defendant. The learned trial judge was fully aware of this and it was for that reason that he granted leave to defend, but, to reiterate what I have said before, he took the view that the defence as to the residue of the claim was not made *bona fide*. It was for that reason that leave to defend was granted on condition of payment into court of the sum in dispute. It is true that a defendant must be given unconditional leave to defend unless it is clear that there is no real substantial question to be tried or that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment (see *Jacobs v. Booth's Distillery Co.*),[1] but when there is something suspicious in the defendant's mode of presenting his case or where the court is left with a real doubt about the defendant's good faith, even though it cannot be said for certain that there is not a triable issue, it is entitled to make an order that the defendant do pay the amount claimed or any lesser sum into court or furnish security for that amount as a condition for leave to defend (see *Fieldrank Ltd. v. Stein*).[2]

I would dismiss this appeal with costs.

Azmi L.P. and Suffian F.J. concurred.

Appeal dismissed.

Solicitors: *Williams & Co.; Donaldson & Burkinshaw.*

HUSSEIN & ANOR. v. MAIDEN

[F.C. (Azmi L.P., Suffian & Gill F.JJ.) September 13, 1969]

[Kuala Lumpur — Federal Court Civil Appeal No. X. 75 of 1968]

Negligence — Collision on highway — Personal injury — Apportionment of liability — Whether appellate court can interfere.

This was an appeal against the judgment of the High Court in which the learned judge found that both the plaintiff and the second defendant were negligent on a 50-50 basis.

Held, dismissing the appeal: (1) in this case both the motorist and the cyclist could have seen each other if they had taken a proper lookout, the motorist owed a duty when travelling on a major road to be on the lookout for other users of the road coming out of a minor road and if he failed to do so he must also be regarded as being negligent;

(2) the appellate court should not interfere with the apportionment of liability by the trial judge as there was nothing exceptional in this case and there was no error of principle.

Cases referred to:—

(1) *Harding (An Infant)* v. *Hinchcliffe*, The Times, April 8, 1964 C.A.

(2) *Williams* v. *Fullerton* (1961) 105 Sol. J. 280.

(3) *Owners of British Fame* v. *Owners of Macgregor, The Macgregor* [1943] A.C. 197.

(4) *Brown & Anor.* v. *Thomson* [1968] 2 All E.R. 708.

FEDERAL COURT

Edgar Joseph Jr. for the appellants.

D.A. Devadason for the respondent.

Cur. Adv. Vult.

Azmi L.P.: This is an appeal by the defendants against the judgment of the High Court at Johore Bahru in which the learned judge found that both the plaintiff and the second defendant were negligent on a 50-50 basis. The first defendant was sued as the employer of the second defendant. Originally the appeal was against both liability and the quantum of damages but at the hearing, counsel for the defendants abandoned the appeal against quantum.

The parties in the suit alleged negligence against each other resulting in a collision between the plaintiff on a bicycle and the second defendant driving a motor-car.

The facts may be summarised briefly as follows. On 28th February 1964, at about 10.45 a.m. the plaintiff, according to his evidence and that of his witness Moorthy, stopped at the junction where Jalan Lama meets Jalan Bentayan. Plaintiff intended to cross the road to the opposite side of Jalan Bentayan and then to turn right in the direction of Jalan Abdullah. It was then raining slightly. His evidence was that after he stopped at the junction, looked left and right and seeing no other vehicles on the road, he proceeded to cross the road and went in the direction of Jalan Abdullah. The next thing he knew was he was in hospital.

Moorthy's evidence was that he was sitting in a coffee shop on the opposite side of Jalan Bentayan and almost directly opposite the junction and that he saw the plaintiff cross the road and being hit by the car coming from the direction of Jalan Abdullah and being thrown on the car and shattering the windscreen.

The plaintiff's wife who, according to the evidence of plaintiff and her own, was with the plaintiff, just before the accident, had at the time of the accident left him and was some distance away. She was called, however, to give evidence primarily to support the presence of Moorthy at the scene. It was the defendant's contention that Moorthy was never at the scene and the cross-examination of this witness was directed mainly in support of that contention.